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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-869

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED CONTINENTAL TUNA CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX

Page

Statement 1

I.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Court of Appeals' Decision Is Plainly Correct 2

II.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Case Does Not Meet the Criteria for Review Set Forth in Supreme Court Rule 19 5

III.

Tuna Corporation Does Not Waive Other Arguments on the Basis of Which It Believes the Courts of Appeals Could Have Reached the Same Result 7

IV.

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
Amell v. United States, 384 U.S. 158 (1966) ..2, 3,	6
Gulf Oil Corp. v. Panama Canal Co., 407 F. 2d 24 (5th Cir. 1969)	3
Ira S. Bushey & Sons, Inc. v. United States, 398 F. 2d 167 (2nd Cir. 1968)	5
United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, 475 F. 2d 478 (5th Cir. 1973) 4,	6
United States v. Philippine National Bank, 292 F. 2d 743 (D.C. Cir. 1961)	4
United States v. Yellow Cab Co., 340 U.S. 543 (1951) 3,	4
Miscellaneous	
Senate Report No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, pp. 3583, 3586	2
Rules	
Rules of the Supreme Court, Rule 19 5,	7
Statutes	
Philippine Civil Code, Sec. 2176	4
Philippine Civil Code, Sec. 2180	4
United States Code, Title 28, Sec. 1346(b)	2
United States Code, Title 28, Sec. 2671	2
United States Code, Title 46, Secs. 741-752	2
United States Code, Title 46, Secs. 781-790	2

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Statement.

United Continental Tuna Corporation (Tuna Corporation), with funds furnished by United States citizen-investors, purchased a fishing vessel, the M.V. ORIENT, in San Pedro, California, and then refitted it at considerable expense. Tuna Corporation was organized as a Philippine corporation to enable the boat to operate in the Republic of the Philippines. On its maiden voyage, outbound for the Philippines, it was run down and sunk by a U.S. Navy destroyer, the U.S.S. PARSONS, at a point 70 miles from San Pedro. Tuna Corporation alleges the casualty was caused by negligent operation of the destroyer and that its financial loss exceeded one million dollars. Tuna Corporation commenced these actions in the District Court against the

United States under the Suits in Admiralty Act (SIA) 46 U.S.C. 741-752, as amended September 13, 1960, the Public Vessels Act (PVA) 46 U.S.C 781-790, and the Federal Tort Claims Act (FTCA) 28 U.S.C. 1346 (b), 2671, *et seq*. The actions were dismissed by the District Court, but that dismissal was reversed by the Court of Appeals which held an action will lie under the SIA as amended. The Government petitions now for review of that decision.

I.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Court of Appeals' Decision Is Plainly Correct.

The Court of Appeals' decision that Tuna Corporation can prosecute its claim against the United States under the SIA, as amended in 1960, is plainly correct. Prior to 1960 coverage of the SIA was limited to damage caused by "merchant" vessels, but in 1960 Congress removed this limitation from the SIA. The legislative history discloses that Congress did this because it was concerned, among other things, about past confusion between "public" and "merchant" vessels and wished to abolish this technical distinction. S. Rep. No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3586. As this Court noted in *Amell v. United States*, 384 U.S. 158, 164 (1966):

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act . . . *Simultaneously Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys, and had caused misfilings in the past* . . ." (Italics added).

The SIA as amended now covers damage caused by any and all types of Government vessels, without limitation, and the pre-1960 distinction between public and merchant vessels no longer exists. If there were any doubt as to whether this distinction has been abolished, which there is not, that doubt would be resolved against the Government since the SIA, like the FTCA, is liberally construed in favor of claimants who have been negligently damaged by Government employees. *Gulf Oil Corp. v. Panama Canal Co.*, 407 F. 2d 24, 28 (5th Cir. 1969); *United States v. Yellow Cab Co.*, 340 U.S. 543, 552 (1951). In view of the foregoing, the Court of Appeals' ruling was plainly correct.

The Government seeks herein to resurrect the pre-1960 distinction under the SIA between public and merchant vessels and thereby restore to life the technical distinction Congress expressly intended in 1960 to abolish. The Government argument is without merit because it ignores the plain language used in the amended SIA, its legislative history, and the Court's clear pronouncement in *Amell v. United States, supra,* that the distinction has been abolished, and, last but not least, the rule of construction favoring liberal interpretation of the SIA in favor of claimants.

The Government's motive in attempting to restore to life a distinction long since abolished is transparent. The Government seeks to resurrect this distinction for the reason that if Tuna Corporation cannot proceed under the SIA, and instead must proceed under the old Public Vessels Act (PVA), then Tuna Corporation's claim, according to the Government, will be barred due to the PVA reciprocity clause. In short, the Government urges an interpretation which, according to the

Government, would permit it to negligently sink and destroy Tuna Corporation's vessel with total impunity.

The Government's argument is not only lacking in legal merit, for the reasons set forth in the Court of Appeals' decision, but would cause a shockingly inequitable and unjust result in this litigation. It should be recalled that the Government has the right, and frequently exercises it, to sue Philippine citizens. Such actions are brought by the Government in this country[1] and can be brought in the Philippine courts.[2] In other words, the Government claims and exercises the right to sue Philippine shipowners for the damage they cause to United States vessels, but the Government now seeks to establish a rule of law which would prevent reciprocal actions by Philippine citizens for damage caused by United States vessels. The Government's position is patently unfair. As this Court observed in *United States v. Yellow Cab, supra,* 552, in rejecting a similar Government argument relating to the Federal Tort Claims Act, "It is fair that this should work both ways". While there may be reasons for denying foreign sovereigns standing to sue, when they cannot be sued, there is no reason for denying this right to individual foreign citizens who are subject to suit by the Government both here and in their own country.

Ths Government's other arguments are likewise unjust and equally lacking in legal merit. The "specific" vs. "general" doctrine of statutory construction (Govt. Br. 17-18) was not raised by the Government in either the District Court or Court of Appeals and should not

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[1]*United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE,* 475 F. 2d 478 (5th Cir. 1973); *United States v. Philippine National Bank,* 292 F. 2d 743 (D.C. Cir. 1961).

[2]Philippine Civil Code, Sections 2176, 2180.

be considered now for the first time. Moreover, that argument is no answer to the legislative history and language used in the 1960 amendment to the SIA, which plainly demonstrate a desire by Congress to abolish the pre-1960 distinction between public and merchant vessels, and to place claims for damage caused by all Government vessels within the parameters of the SIA. Similarly, the Government argument is no answer to the strongly entrenched policy of liberally interpreting claims statutes and of not favoring claims of sovereign immunity. The repeal by implication argument, which was raised below, fails for the same reasons.

II.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Case Does Not Meet the Criteria for Review Set Forth in Supreme Court Rule 19.

Review by the Supreme Court is not a matter of right and is not granted except where, in sound judicial discretion, there are special and important reasons for review. The reasons usually justifying review are set forth in Supreme Court Rule 19, and none of those reasons are pertinent to this case.

There is no conflict between the Courts of Appeals on the issue herein raised. The Ninth Circuit's decision is not only in accord with the plain, unequivocal language of that statute, but, also, is in agreement with the only other decisions from other circuits on the point. In *Ira S. Bushey & Sons, Inc. v. United States,* 398 F. 2d 167, 169 (2nd Cir. 1968), it was held that damage caused by a Coast Guard vessel (which would have been a "public" vessel under the pre-1960 distinction between public and merchant vessels) would be

cognizable under the SIA as amended. In *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra*, 480, which involved damage to a Philippine vessel caused by a U.S. Navy submarine, the Court specifically did not decide the issue but noted that a literal interpretation of the SIA, as amended, would encompass damage caused by vessels formerly classified as public, and such interpretation of the SIA is usually required. So far as is known by Tuna Corporation, no other Circuit has expressed an opinion upon the point of law herein involved and, plainly, there is no disagreement between the Circuits which have considered it.

The issue raised can hardly be regarded as an important question of federal law which should be settled by this Court, aside from what has already been expressed in *Amell v. United States, supra,* as is evidenced by the paucity of cases in which the issue has arisen and the small number of potential claimants it affects. The Government suggestion that this ruling will cripple the national war effort in time of hostilities, because Government crew members can be subpoenaed under the SIA to give testimony (Govt. Br. 19) is lacking in merit. The Government overlooks that our District Courts have broad discretion under the Federal Rules of Civil Procedure to regulate the taking of testimony and, plainly, our District Courts will not permit claimants to secure the testimony of Government personnel under circumstances which would interfere with or cripple national war efforts, as the Government allegedly

fears. The Government's other suggestion (Govt. Br. footnote 11) that the allowance of prejudgment interest under the SIA, in this and similar cases, will cause the Government "substantial" financial problems is likewise without merit in view of the small number of claimants affected and, especially so, because the District Courts will not award prejudgment interest except where it is just to do so.

Nor are any of the other considerations for review set forth in Rule 19 here present. State and territorial questions are not here involved and it cannot be asserted that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Tuna Corporation Does Not Waive Other Arguments on the Basis of Which It Believes the Courts of Appeals Could Have Reached the Same Result.

Tuna Corporation wishes to emphasize that it is not waiving other arguments it presented to the Court of Appeals on the basis of which the same result could have been reached. If the Government's petitioner for a writ of certiorari is granted, Tuna Corporation will wish to renew its alternative arguments that: (1) Tuna Corporation should be treated as a domestic shipowner rather than as an alien, and can sue under the PVA; (2) Tuna Corporation, even if treated as an alien, can sue under the PVA because the "reciprocity" clause is void as an unconstitutional denial of equal protection; and (3) if Tuna Corporation cannot recover under the SIA or PVA, then it is entitled to sue under the FTCA.

IV.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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